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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 956

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Petitioner,

vs.

HARNISCHFEGER CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counsel for the petitioner beg the entire issue when, in the "Question Presented" on page 2 of their Petition, they refer to *"a rate labelled by contract."*. The use of this phrase *assumes* the contract rate is fictitious or unreal and bears no relations to the actual wages paid. There is no question of *bona fides* of the contract in the instant case.

The real issue is: Where the parties in good faith agreed upon and fixed by the written contract the rate at which the employees were employed is such contract valid? Counsel cannot ignore the express determination of the Circuit Court of Appeals (R. 101) that:

> "If the wage agreement in this case did not settle the regular rate in a bona fide manner through nego-

> tiation and did not respect the statutory minimum provisions, we are at loss to know how the parties may cover the subject by agreement."

In contrast to the situation in *Walling vs. Youngerman-Reynolds Hardwood, Inc.*, No. 955, October term, 1944, for which Petition for Certiorari is also concurrently sought (See p. 15 of the Petition herein) the Harnischfeger system of compensation has been in effect since 1927 (R. 9) and overtime compensation above 40 hours has been regularly paid since 1933 (R. 49). Local Union 1114 (C. I.O.) of the United Steelworkers of America was the sole collective bargaining representative of the employees and was recognized as such by the Harnischfeger Corporation (R. 9, 13). Such collective bargaining representatives are favored by the Fair Labor Standards Act, and certain agreements made as a result of collective bargaining by such representatives are exempt from the overtime provisions of that Act. (See Section 7(b) of Fair Labor Standards Act).

The employment agreement in question was with this union and has been renewed annually at least since October 24, 1938, the effective date of the Fair Labor Standards Act (R. 9). The renewal in evidence was dated December 9, 1942, on which date the consistent position of the Administrator as to the method of computing the regular rate under incentive systems, when the parties had not validly fixed it by contract, was well known. (See Interpretive Bulletin No. 4, issued November, 1938, and revised November, 1940).

Counsel state the position of the Administrator on page 12 of their brief, as follows:

> "But it has also been his (Administrator's) consistent position that, once the actual rate of compen-

> sation for non-overtime work has been fixed by the employment agreement, the employer must pay one and one-half times that rate for overtime and cannot escape this obligation by any contractual arrangement fixing for the purposes of Section 7 some other rate as the 'regular rate of pay'."

We agree with this statement.

This Court will note that throughout their brief counsel erroneously refer to the "regular rate *of pay*." The statute uses no such language. It is explicit and refers to "the regular rate *at which he is employed*." Under the doctrine of *Walling vs. Belo Corp.*, 316 U.S. 624, this means the rate fixed in good faith by the employment agreement. Payments resulting from incentive earnings necessarily vary from day to day and from employee to employee, i.e. the "rate of pay" is varying and irregular; "the rate at which he (the employee) is employed" is, under this contract, fixed and regular. If Congress had intended that overtime should be one and one-half times the regular rate at which the employee is *paid*, it would not have said "the rate at which he is *employed*." This is the construction placed upon the statute by this Court. Petitioner's claim that the Circuit Court of Appeals for the Seventh Circuit misundersood the decision of this Court is without foundation.

In *Overnight Motor Co. vs. Missel*, 316 U.S. 572, Mr. Justice Reed after discussing the constitutional issues raised, said at page 579:

> "* * * we are concerned at this point only with the method of finding the regular rate *under the contract with respondent*." (Italics supplied)

Since the contract specified only a weekly salary with variable hours of work per week, this court determined that the regular rate at which the employee was em-

ployed was the rate per hour at which the employee was actually compensated. However, Mr. Justice Reed further stated at page 581:

> "*This contract differs* from the one in Walling v. Belo Corp., post, p. 624, where the contract *specified an hourly rate and not less than time and a half for overtime*, with a guaranty of a fixed weekly sum and required the employer to pay more than the weekly guaranty where the hours worked at the contract rate exceeded that sum." (Italics supplied)

In *Walling vs. Belo Corp.*, 316 U.S. 624, Mr. Justice Reed dissented on the issue as to what the parties had intended to be the regular rate of compensation for the employees, but at page 636, he said:

> "The Court's interpretation that, *in the absence of bad faith*, any form of contract which assures the payment of the minimum wage and the required overtime complies with the Act may be assumed to be correct." (Italics supplied)

That this was in fact the *ratio decidendi* of the decision is established by the language of Mr. Justice Byrnes, at page 631:

> "In its initial stage the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term, 'regular rate.' *But it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract.* In the case before us, such an effort has been made, and in the example given the regular rate has been specified as 67 cents an hour. The difficulty arises from the inclusion of the $40 guaranty. The problem is whether *the intention of the parties* to set 67 cents an hour as the regular rate squares with their intention to guarantee a weekly income of $40. The Administrator's position is that these two objectives are inherently inconsistent and that the intention to fix the regular hourly rate at 67 cents is

> overriden by the intention to guarantee the $40 per week." (Italics supplied)

This Court rejected the contention of the Administrator, which is again urged here, and held that compliance with the Belo contract did not violate the Fair Labor Standards Act.

This rule, namely, that a written agreement of employment, which fixes the regular rate at which the employee is employed, is controlling *if made in good faith*, was again affirmed by this Court in *Walling vs. Helmerich & Payne, Inc.*, No. 27, October term, 1944, decided November 6, 1944, wherein it was stated by Mr. Justice Murphy:

> "The Act clearly contemplates the setting of the regular rate *in a bona fide manner through wage negotiation* between employer and employee, provided that the statutory minimum is respected." (Italics supplied)

This is wholly consistent with the decision in *Walling vs. Belo Corp.*, 316 U.S. 624, and *Overnight Motor Co. vs. Missel*, 316 U.S. 572, and completely negatives the claim of the Administrator in his petition that this Court's decisions have been misunderstood by the Circuit Court of Appeals for the Seventh Circuit.

Manifestly, in the case of a written employment agreement made in good faith, as conceded here, the best evidence of the rate at which an employee is employed is the written agreement. The Administrator relies upon one of the most common fallacies in logic identified by the phrase *"post hoc ergo propter hoc."* The fact that an employee received $X.00 at the end of a pay period does not negative the written agreement nor establish that the rate at which he was employed is $X.00 divided

by the hours worked. The statute neither requires nor supports this reasoning. In the *absence* of an express agreement on this point, the earnings are, of course, presumptive evidence. But it is fallacious and contrary to the express language of the statute to ignore the written agreement of the parties made in good faith and rely entirely upon such assumptions.

The specific contract provisions in question were set forth by the trial court (R. 85) in his findings of fact, as follows:

> "Section 3(e) of the employment contract provides: '* * * for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee. * * *' Section 4(a) of the contract provides: 'The Company will operate all shop departments on a basic eight (8) hour day and forty (40) hour week, with time and one-half, computed for incentive workers on their base rate as heretofore defined in Section 3, paragraph (e) * * *.'"

The following contract provisions are likewise consistent only with this expressed intent on the part of the employer and employees:

(a) By Section 7 of the contract, the parties agreed that if an employee was improperly discharged, he should be reinstated with full compensation at his "regular base rate" for the time lost (R. 21).

(b) Section 4(f) of the contract provides that when an employee reports for work without notice during the previous day not to report, he must be supplied with either four hours work or be paid four hours "day rate pay." Day rate pay is synonymous with base rate (R. 17, 43).

(c) The incentive workers constantly request and are given merit increases in their base rates. They are constantly being upgraded and base rates increased through such merit upgrading. As many as 300 such increases are ordinarily given in each day period (R. 57-58).

(d) Although the large majority of the incentive employees (98½%, but 49% of all *production* employees (R. 85) customarily earn *some* incentive earnings above base rate, many employees *earn no incentive premium* and, in fact, actually *earn less at piece work* than the amount of their base rates. *In such cases they receive the base rate.* This difference between the base rate and the piece work earnings is called "excess labor" which averages $56.00 per month of $67,200 per annum (R. 52).

The opinion in *Walling vs. Belo Corp.*, 316 U.S. 624, at page 631, may be paraphrased to apply to this case as follows: (The facts of this case are in italics, the corresponding facts from the opinion are in parenthesis)

> "The difficulty arises from the inclusion of the *incentive earnings* ($40 guarantee). The problem is whether the intention of the parties to set the *base rate* (67 cents an hour) as the regular rate squares with their intention to *provide an opportunity to make incentive earnings* (guarantee a weekly income of $40). The Administrator's position is that these two objectives are inherently inconsistent and that the intention to fix the regular hourly rate at *the base rate* (67 cents) is overriden by the intention to *pay incentive earnings if earned* (guarantee $40 per week)."

The Circuit Court of Appeals, following the rule of this Court held the intention to employ at the base rate and to pay overtime on that rate as the "regular rate" controlled any implied intention to pay overtime based on incentive earnings if earned.

There is no dissatisfaction with the contract expressed on the part of the Union or any of the employees. The Circuit Court of Appeals stated: "There is a mutual concession of good faith between opposing litigants ***" (R. 98). Such finding is conclusive in determining that the contract provision is not a mere artificial label or a capricious determination of fictitious and unreal rates. The Court must determine the real intent of the parties, and if such intention is within the framework of the statute, *it must necessarily be controlling.*

It is undisputed that in normal times the management of Harnischfeger Corporation attempts to hold down overtime hours and required special permission to work overtime (R. 54). Although merchandise produced during overtime hours necessarily has a higher labor cost, this company made no attempt to keep track of what merchandise was made in overtime hours (R. 54). In normal operations, overtime is the exception rather than the rule. The contract provision fixing the regular rate at which the incentive worker was employed first appeared in the contract in 1938 when overtime was the exception. Overtime has grown enormously during the war. It will be greatly reduced when normal peacetime operations are resumed. The Fair Labor Standards Act was passed in peacetime and this contract provision was first made in peacetime. *Both are intended primarily to regulate normal peacetime conditions.* By their written contract the parties stated their intention as explicitly as was possible that the base rates shall be the regular rate of employment *for all purposes.*

In support of their argument that the agreement fixing the base rate as the regular rate is fictitious or arbitrary, counsel rely heavily upon the contract provisions that under certain circumstances a pieceworker may receive a

premium of not less than 20% over his hourly base rate (Section 3, paragraphs (h) and (i), R. 15), or when assigned to work "on single piece or small order jobs", he will be paid "his average high earning rate" when this work is done "under conditions beyond his control which make it impossible for him to earn his average high earning rate." (Section 3 (j), R. 15).

The Administrator's brief fails to point out that clause 3 (j) applies only "when a pieceworker is required to work on single piece or small order jobs." (R. 15) The works manager, the sole witness, who was called by the Administrator, testified that under clauses 3 (h) and 3 (i) this premium was paid "not very often, but it does happen, unfortunately" (R. 55), but that the payment of the average high earning rate under clause 3 (j) had never occurred (R. 55-56). He further testified without dispute that the 20% figure was the result of collective bargaining, and that "the fellows that bargained for the contract probably would like it to be 100 per cent." (R. 42).

We desire further to point out that Section 3 (n) of the contract (R. 16) provides for a *cancellation of these premiums at the discretion of the management* for any wilful misuse or abuse of those provisions, and the witness testified this power of cancellation had been invoked. (R. 56).

Manifestly these were clauses to meet emergency situations, some of which never had arisen, and since the premiums could be cancelled by the management, only the base rate was *constant under even these circumstances.*

As in *Walling vs. Belo Corp.*, 316 U. S. 624, the issue here is—What was the intention of the parties and what did *they* consider the controlling factor? There was no

showing in that case as to how often employees worked more than 54½ hours and received more than the weekly guarantee. That provision of the contract was important because it was evidence of the intention of the parties. So here, the *number* of the employees benefiting each pay day is unimportant. It is a mere matter of degree.

An incentive worker, no matter how efficient, may at times fail to earn piece rate earnings equal to his base rate. Mr. Menck testified that there is no customary percentage of piece work earnings; that in some pay periods it has averaged as low as 5% and in others as high as 29% (above the base rate), and said "She can go all over the lot" (R. 67), and sometimes even "the best men in our place * * * don't earn a cent" of piece work earnings. (R. 43).

The contract evidences the express desire of the parties to have a guaranteed minimum hourly rate not related to the fluctuating *volume* of their production. This contract clause *operated every pay day* as is apparent from the amount of excess labor which the company has paid. Can the Court disregard the clear intention of the parties merely because on each pay day only some of the employees needed its benefit?

We submit that the frequency of the application of this clause *to individual workers* cannot change the expressed intention of the parties. The fact that the clause specifies a rate which is not fictitious and which has a direct relationship to wages paid conclusively appears from the fact that *it operated as to some employees on every pay day.*

In the case of *Walling vs. Belo Corp.*, 316 U.S. 624, this court gave great weight to the desire of the employees

to have the benefit of the guaranteed weekly salary. So here the parties have annually for five years intentionally renewed the contract to have the definite assurance that every incentive worker shall have certainty in the amount of his hourly compensation. Although this contract does not provide a guaranteed weekly salary, it does guarantee a definite hourly rate to employees whose possible earnings may fluctuate widely.

It was pointed out in *Walling vs. Belo Corp,* 316 U.S. 624, that a rate determined by the method contended for by the Administrator was irregular in the mathematical sense. It could not be calculated until after the work week has been completed. With Harnischfeger Corporation, piece work jobs frequently extend through more than one pay period (one-half month), and a mathematical rate could not be calculated in each pay period. An incentive employee of Harnischfeger Corporation has to wait until the completion of the particular piece work job to ascertain whether he has any incentive earnings thereon. (R. 52, 53).

The employer and employees have been accustomed for many years to think and to speak for their base rates as the regular rates at which the employee is employed and explicity so stated in their employment contract. It is not capricious, nor does it provide for fictitious or unreal rates which have no relation to the wages paid. Rather is expresses the intent of the parties, arrived at after collective bargaining in good faith. In the light of all the facts, it is manifest that this provision of the employment contract is reasonable and proper and should be upheld.

The decision of the Circuit Court of Appeals for the Seventh Circuit is not only consistent with, but follows,

the decision of this Court in *Walling vs. Belo Corp.*, 316 U.S. 624, wherefore the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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